

1
2
3 **UNITED STATES DISTRICT COURT**
4 **DISTRICT OF NEVADA**

5 * * *

6 Martin J. Walsh, Secretary of Labor,
United States Department of Labor,

Case No. 2:20-cv-00510-KJD-DJA

7 Plaintiff,

Order

8 v.

9 Unforgettable Coatings, Inc.; et al.,

10 Defendant.
11

12 This is a Fair Labor Standards Act (FLSA) action arising out of Plaintiff the Secretary of
13 Labor's investigation into Defendants'¹ pay scheme for their employees. Plaintiff sues
14 Defendants for damages and injunctive relief, alleging violations of the FLSA. Plaintiff moves to
15 quash Defendants' subpoenas to third parties (ECF No. 167) and for a protective order preventing
16 Defendants from deposing the Department of Labor's Regional Coordinator for Workplace
17 Crimes (ECF No. 169). Plaintiff argues that Defendants seek privileged and irrelevant
18 information through their subpoenas and deposition request. Defendants move for the Court to
19 appoint a special master to oversee discovery, arguing that the frequency and detail of the parties'
20 discovery disputes warrant a special master. (ECF No. 171). Defendants also move for the Court
21 to expedite its review of the pending motions because discovery is ending soon, and the Court
22 indicated that it would not grant future extensions. (ECF No. 172).

23 Because the Court finds that the subpoenas exceed the scope of discovery, it grants
24 Plaintiff's motion to quash. (ECF No. 167). Because the Court finds that Defendants are entitled
25

26 ¹ Defendants include Unforgettable Coatings, Inc. and its various subsidiaries and individuals
27 involved in its ownership, including Unforgettable Coatings of Idaho, LLC; Unforgettable
28 Coatings of Arizona, LLC; Unforgettable Coatings of Utah, Inc; Blue Ape Painting, LLC; Shaun
McMurray; Shane Sandall; Cory Summerhays; and Galia Carnejo.

1 to explore discrepancies, but not entitled to explore U visa information, it grants in part and
2 denies in part Plaintiff's motion for a protective order. (ECF No. 169). Because the Court finds
3 that the parties are entitled to an opportunity to be heard, it sets Defendants' motion for a special
4 master for a hearing. (ECF No. 171). Because the Court has prioritized the parties' motions
5 before other motions that became ripe before them, it grants Defendants' motion for expedited
6 relief. (ECF No. 172).

7 **I. Discussion.**

8 **A. *The Court grants Plaintiff's motion to quash.***

9 1. The parties' arguments.

10 Plaintiff moves for the Court to quash Defendants' subpoenas to third-party worker
11 advocacy group Arriba Las Vegas Worker Center, the Arriba Center's employees, and
12 Defendants' former employees. (ECF No. 167). Plaintiff points out that the subpoenas
13 Defendants served are extremely similar to subpoenas Defendants already tried to serve on a
14 different worker advocacy group and its employee, which subpoenas the Court has already
15 quashed. (*Id.* at 5-6). Plaintiff asserts that he has standing to move to quash these subpoenas
16 because he claims a personal right and privilege in their content and because he is in the unique
17 position of heading an agency to which employees petition to address grievances. (*Id.* at 7). He
18 argues that this unique standing gives him a broader ability to challenge these subpoenas than a
19 private litigant might have. (*Id.* at 7-9). Plaintiff asserts that he also has a personal privilege
20 over the documents because the subpoenas seek information protected by the informant's
21 privilege, the investigative files privilege, and the work product doctrine. (*Id.* at 9). He also
22 asserts that the subpoenas are overbroad and unduly burdensome because they would require the
23 subpoenaed individuals to provide every documented interaction that Defendants' employees had
24 with the Arriba Center and the Department of Labor for the past six years. (*Id.* at 17). These
25 documents could encompass personal text messages and items completely unrelated to the
26 litigation, Plaintiff asserts, and would result in intimidating witnesses who sought help from
27 community organizations under the expectation that their confidential information would not be
28 released. (*Id.* at 6).

1 Defendants respond and concede that Plaintiff has standing, but only to assert privileges,
2 not to assert overbreadth or burden. (ECF No. 170 at 12-13). Defendants argue that Plaintiff has
3 not provided any mandatory authority that he is entitled to some sort of expanded or unique
4 standing by virtue of being the Secretary of Labor. (*Id.*). And because Plaintiff has brought a
5 motion to quash—not a motion for protective order—Defendants assert that Plaintiff can only
6 raise privileges, rather than burden or overbreadth, which objections are exclusive to the persons
7 subject to the subpoenas. (*Id.* at 12-14). But Defendants assert that Plaintiff has not and cannot
8 support his claimed privileges. (*Id.* at 14-19). They argue that Plaintiff can only speculate about
9 what most of the documents will entail and thus cannot make a privilege log or assert that the
10 work product doctrine applies. (*Id.*). Regarding the investigative files privilege, Defendants
11 assert that Plaintiff has not met his burden to specify the information with particularity or provide
12 an affidavit from a responsible official with personal knowledge of the information. (*Id.*).
13 Regarding the informant’s privilege, Defendants assert that they have a compelling need to
14 overcome the privilege. (*Id.* at 19-20). To the extent the Court were to consider the privileges,
15 Defendants argue that the subpoenaed individuals should be required to comply with the
16 subpoenas and submit the documents to the Court for *in camera* review to determine if the
17 privileges apply. (*Id.*). Defendants do not address the similarity of their instant subpoenas to the
18 subpoenas that the Court has already quashed.

19 Plaintiff replies that Defendants’ subpoenas are not in the bounds of relevance or
20 proportionality, particularly because Defendants do not address how they are proper after the
21 Court already quashed substantially similar subpoenas. (ECF No. 174 at 2-3). Plaintiff adds that
22 he is unaware of every document that the subpoenaed parties possess, but that the documents
23 undoubtedly include communications from employees who expected their conversations with the
24 subpoenaed parties to be confidential. (*Id.* at 3-4). Regarding Defendants’ argument that Plaintiff
25 cannot raise burden or overbreadth because he brought a motion to quash, Plaintiff asks the Court
26 to consider the motion to quash as a motion for a protective order. (*Id.*). He adds that the
27 individuals on whom Defendants have served subpoenas cannot afford attorneys, are being asked
28 to provide six years’ worth of personal documents and text messages, and—in the case of former

1 employees—are being asked to provide this personal information to the very employer they assert
2 has retaliated against and intimidated them. (*Id.* at 5). Plaintiffs point out that Defendants are
3 attempting through their subpoenas to find out the identity of informants whose identity the court
4 has already determined is not essential to the determination of the case. (*Id.* at 5-6). Moreover,
5 the Defendants have already deposed employees and can depose the individuals to whom they
6 now direct their subpoenas. (*Id.* at 6-7). Plaintiff concludes that Defendants’ subpoenas are even
7 broader than the ones the Court already quashed and that, given Defendants intent to learn the
8 identity of informants, the Court should again quash the subpoenas at issue here. (*Id.*).

9 2. Analysis.

10 “[A] party lacks standing under Fed. R. Civ. P. 45[(d)(3)(A)] to challenge a subpoena
11 issued to a non-party unless the party claims a personal right or privilege with respect to the
12 documents requested in the subpoena.” *G.K. Las Vegas Ltd. Partnership v. Simon Property*
13 *Group, Inc.*, No. 2:04-cv-0119-DAE-GWF, 2007 WL 119148, at *4 (D. Nev. Jan. 9, 2007);
14 *compare In re Rhodes Companies, LLC*, 475 B.R. 733, 740 (D. Nev. Apr. 30, 2012) (declining to
15 adopt the “personal right or privilege” standing rule for motion to quash subpoenas). “A party’s
16 objection that the subpoena issued to the non-party seeks irrelevant information or imposes an
17 undue burden on the non-party are not grounds on which a party has standing to move to quash a
18 subpoena issued to a non-party, especially where the non-party, itself, has not objected.” *G.K.*
19 *Las Vegas Ltd. Partnership*, 2007 WL 119148 at *4. “A party can however, move for a
20 protective order in regard to a subpoena issued to a nonparty if it believes its own interest is
21 jeopardized by discovery sought from a third party and has standing under Rule 26(c) to seek a
22 protective order regarding subpoenas issued to non-parties which seek irrelevant information.”
23 *Id.* at *3.

24 The scope of discovery under Rule 45 is the same as that under Rule 26. *Heard v. Costco*
25 *Wholesale Corporation*, No. 2:19-cv-00673-RFB-DJA, 2020 WL 515841, at *1 (D. Nev. Jan 31,
26 2020). Federal Rule of Civil Procedure 26(b)(1) provides for broad and liberal discovery, but
27 limits discovery based on proportionality. Fed. R. Civ. P. 26(b)(1). Proportionality considers
28 “the importance of the issues at stake in the action, the amount in controversy, the parties’ relative

1 access to relevant information, the parties' resources, the importance of the discovery in resolving
2 the issues, and whether the burden or expense of the proposed discovery outweighs its likely
3 benefit." Fed. R. Civ. P. 26(b)(1). The court, on its own or by motion, "must limit" the extent of
4 discovery otherwise allowed if it determines that the discovery sought is outside the scope
5 permitted by Rule 26(b)(1). Fed. R. Civ. P. 26(b)(2)(C)(iii).

6 The Committee Notes to the 2015 amendment to Rule 26(b)(1) emphasized the
7 importance of proportionality and the objective of "encourage[ing] judges to be more aggressive
8 in identifying and discouraging overuse." Fed. R. Civ. P. 26(b)(1), Advisory Committee Notes
9 (2015).

10 It also is important to repeat the caution that the monetary stakes are
11 only one factor [of the proportionality analysis], to be balanced
12 against other factors. The 1983 Committee Note recognized 'the
13 significance of the substantive issues, as measured in philosophic,
14 social, or institutional terms. Thus the rule recognizes that many
15 cases in public policy spheres, such as employment practices, free
16 speech, and other matters, may have importance far beyond the
17 monetary amount involved'...The burden or expense of proposed
18 discovery should be determined in a realistic way.

16 Fed. R. Civ. P. 26(b)(1), Advisory Committee Notes (2015).

17 The Court grants Plaintiff's motion to quash. As a preliminary matter, the parties agree
18 that Plaintiff has standing to move to quash the subpoenas. So does the Court. And while the
19 parties disagree whether Plaintiff appropriately raised his relevance and burden objections
20 through the motion to quash, the Court nonetheless finds that the subpoenas exceed the scope of
21 discovery.²

22 The Court recognizes that the more procedurally appropriate way for Plaintiff to have
23 raised these objections would have been through a motion for a protective order. It also
24 recognizes that Plaintiff's request—raised for the first time in reply—for the Court to construe his
25 motion as one for a protective order was procedurally improper. *See Zamani v. Carnes*, 491 F.3d

26
27 ² Because the Court decides the motion under Rule 26(b)(1), it does not reach the parties
28 arguments about privilege or their arguments regarding whether Plaintiff has a unique form of
standing.

1 990, 997 (9th Cir. 2007) (“[t]he district court need not consider arguments raised for the first time
2 in a reply brief”). On the other hand, courts in this district have construed and applied standards
3 regarding motions to quash and motions for protective orders differently and sometimes
4 interchangeably. And Defendants have provided no authority that mandates the Court to
5 disregard Plaintiff’s breadth and relevance arguments because he brought a motion to quash
6 rather than one for a protective order.

7 To the contrary, Rule 26(b)(2)(C)(iii) mandates that the Court—on its own—limit
8 discovery outside the scope of Rule 26(b)(1). And under Rule 26(b)(1) and the Committee Notes
9 to that Rule, proportionality considerations include the very concerns Plaintiff has raised in his
10 motion to quash. Plaintiff has pointed out that the individuals to whom Defendants have directed
11 their subpoenas—the Arriba Center, its employees, and Defendants’ former employees—“do not
12 earn much money and cannot afford an attorney to represent them in federal court.” (ECF No.
13 174 at 5). These individuals would thus have difficulty objecting to Defendants’ subpoenas,
14 which request broad categories of documents that could capture irrelevant information.
15 Moreover, in the case of Arriba Center employees, Plaintiff points out that employees often speak
16 to Arriba Center employees expecting that their conversations will remain confidential. And in
17 the case of Defendants’ former employees, Plaintiffs emphasize the intimidation that the
18 subpoenas would create by forcing these employees to provide extensive documents—including
19 personal texts—to the employer they allege retaliated against or intimidated them.

20 Additionally, Defendants assert that they have deposed or will depose the individuals to
21 whom they direct their subpoenas. Thus, Defendants will have an opportunity to ask these
22 individuals about the topics which their subpoenas cover. While Defendants argue that the
23 documents are necessary for them to prepare for the depositions, the Court does not find their
24 need to prepare sufficient to warrant the subpoenas’ breadth.

25 Finally, Defendants do not address the similarity of the instant subpoenas to those which
26 the Court already quashed. Without more explanation about why these subpoenas do not create
27 the same concerns as the previous ones, the Court finds no reason to deviate from its previous
28 decision to quash them. The Court thus grants Plaintiff’s motion to quash the subpoenas.

1 **B. *The Court grants in part and denies in part Plaintiff's motion for a protective***
2 ***order.***

3 1. The parties' arguments.

4 Plaintiff argues that the Court should enter a protective order preventing Defendants from
5 deposing Jennifer Shim, the Regional Coordinator for Workplace Crimes, because she has no
6 knowledge that would impact the case. (ECF No. 169). Plaintiff explains that Defendants wish
7 to depose Shim because they believe that Shim was involved in providing immigration benefits to
8 certain of Defendants' employees in exchange for cooperation with the Department of Labor's
9 investigation. (*Id.* at 2). But Plaintiff asserts Shim had no contact with any of Defendants'
10 employees or their families and that no employees were given immigration benefits in connection
11 for cooperation with the investigation. (*Id.*). Moreover, Plaintiff argues that, given Shim's role in
12 the immigration visa process, allowing Defendants to depose her would create the dangerous
13 precedent that employers could dig into their employees' immigration status when defending
14 against an FLSA claim. (*Id.* at 8-9). Plaintiff asserts that this would create a chilling effect on the
15 engagement of employees in seeking relief. (*Id.* at 10). And even if Defendants did depose Shim,
16 Plaintiffs assert that she is prohibited by statute from disclosing information related to
17 individuals' visa applications. (*Id.* at 12). Because the deposition would be more prejudicial than
18 probative, Plaintiff asserts that a protective order is warranted. (*Id.* at 10-12).

19 Defendants respond that they are entitled to explore whether witnesses are biased because
20 they received immigration benefits in exchange for their cooperation. (ECF No. 173). Regarding
21 Plaintiff's argument that Shim was not involved with this case, Defendants assert that one
22 Department of Labor employee testified that she had received an email from Shim relating to
23 someone in the case. (*Id.* at 3). And Defendants assert that a former employee made a public
24 statement that he received deferred action as a key witness in the investigation, while the Arriba
25 Center has called on the government to provide immigration benefits to Defendants' employees.
26 (*Id.*). Defendants assert that they are entitled to explore the contradiction between these
27 statements and Plaintiff's assertion that Shim was not involved and that no employees were given
28 immigration benefits. (*Id.*). Defendants assert that all their other attempts to learn about whether

1 employees were given immigration benefits in connection with their cooperation were met with
2 Plaintiff's instructions to witnesses not to answer and objections to interrogatories. (*Id.* at 8-13).
3 Thus, this deposition is necessary Defendants argue, and would be less intimidating than deposing
4 or interviewing their employees themselves. (*Id.* at 18). Regarding Plaintiff's argument that the
5 information is protected by statute, Defendants assert that the statute to which Plaintiff cites is
6 inapplicable to Shim and that it would not apply here, where a protective order can protect the
7 confidentiality of the information. (*Id.* at 19).

8 Plaintiff reasserts in reply that Shim was not involved in the investigation in this case.
9 (ECF No. 176). Plaintiff asserts that he has established good cause to protect against Defendants
10 discovering their employees' immigration information because the employees have asserted that
11 Defendants threatened them on that basis. (*Id.* at 3). Plaintiff explains that FLSA protections are
12 afforded to all employees, regardless of immigration status and thus, immigration information is
13 irrelevant. (*Id.* at 4). Moreover, multiple courts have found immigration status to be protectable.
14 (*Id.*). Plaintiff asserts that a protective order would be insufficient to protect the employees here
15 because the harm is done in simply asking the employees questions regarding their immigration
16 status. (*Id.* at 7-8). Additionally, the Court has already granted Defendants the ability to ask very
17 limited questions regarding immigration. (*Id.*).

18 2. Analysis.

19 Federal Rule of Civil Procedure 26(c) governs protective orders. Fed. R. Civ. P. 26(c). It
20 provides that the "[t]he court may, for good cause, issue an order to protect a party or person from
21 annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c)(1).
22 This "burden is upon the party seeking the order to 'show good cause' by demonstrating harm or
23 prejudice that will result from the discovery." *Wells Fargo Bank, N.A. v. Iny*, No. 2:13-cv-01561-
24 MMD-NJK, 2014 WL 1796216, at *3 (D. Nev. May 6, 2014) (internal citation and quotation
25 marks omitted). Rule 26(c) requires that the moving party make a "particularized showing" of
26 Rule 26(c)(1)'s enumerated harms. *See Foltz v. State Farm Mut Auto. Ins. Co.*, 331 F.3d 1122,
27 1138 (9th Cir. 2003).

1 The Ninth Circuit's decision in *Rivera v. NIBCO, Inc.* stands for the proposition that the
2 Ninth Circuit maintains a "preference for finding [immigration] information impermissible" in
3 discovery because of its chilling effect. *See Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1064-1066
4 (9th Cir. 2004); *Washington v. Horning Brothers, LLC*, No. 2:17-cv-0149-TOR, 2018 WL
5 2208215, at *4 (E.D. Wash. May 14, 2018). There, Latina and Southeast Asian workers sued
6 their employer, NIBCO, after NIBCO made them take exams given only in English and fired
7 them after they performed poorly. *See id.* at 1061. The plaintiffs sought a protective order
8 against NIBCO inquiring into their immigration status. *See id.* The Ninth Circuit upheld the
9 magistrate judge's granting of a protective order, finding that allowing NIBCO to discover its
10 employees' immigration status would chill both undocumented and documented workers'
11 willingness to report workplace abuses. *See id.* at 1065.

12 The Eastern District of Washington extended the *NIBCO* court's reasoning to U visas³ in
13 *Washington v. Horning Brothers, LLC*, finding that an employer's discovery into U visas
14 provided to its employees was more prejudicial than probative. *Washington*, 2018 WL 2208215,
15 at *6. There, plaintiffs sued their employer for sex discrimination and harassment. *See id.* at *1.
16 The employer sought the plaintiffs' U visa documents in discovery, asserting that evidence that
17 the plaintiffs received U visas would show potential bias. *See id.* at *4-6. While the court
18 acknowledged the employer's concern that its employees could fabricate or exaggerate their
19 claims to receive a U visa, it found the employer's concern was not outweighed by the potential
20 chilling effect of disclosing an employee's immigration status. *See id.*

21 The Court grants in part and denies in part Plaintiff's motion for a protective order. While
22 Plaintiff has demonstrated good cause to limit a deposition of Shim, he has not made a
23 particularized showing that would support an order to forbid it completely. While Plaintiff asserts
24 that, by deposing Shim, Defendants would intimidate employees, Plaintiff has not explained how
25

26 ³ A U visa is "a temporary nonimmigration status for immigrant victims who suffered substantial
27 abuse as a result of criminal activity, possess information about that criminal activity, and have
28 been helpful to the investigation or prosecution of that criminal activity." *Washington*, 2018 WL
2208215, at *1.

1 Shim's deposition alone would cause that intimidation. On the other hand, Defendants have
2 pointed to inconsistent facts which lead them to believe that Shim was involved with the
3 Department's investigation and that Plaintiff may have offered employees some form of
4 immigration benefit, contrary to Plaintiff's statements.

5 To balance Defendants' desire to explore the inconsistencies they assert to have found
6 with the Ninth Circuit's preference for finding immigration information impermissible in
7 discovery, the Court will allow Defendants to depose Shim on a limited basis. Defendants may
8 not ask Shim about the immigration status or U visa applications of any specific individual or the
9 identity of any individual to whom she may have helped provide an immigration benefit.
10 Defendants may, however, ask her generally whether she helped provide immigration benefits to
11 individuals involved in the Department of Labor's investigation into Defendants. The deposition
12 will be limited to two hours. The Court thus grants in part and denies in part Plaintiff's motion
13 for a protective order.

14 ***C. The Court sets a hearing on Defendants' motion for a special master.***


15 A court may appoint a special master to "address pretrial and posttrial matters that cannot
16 be effectively and timely addressed by an available district judge or magistrate judge of the
17 district." Fed. R. Civ. P. 53(a)(1)(C). Before appointing a special master, the court must give the
18 parties notice and an opportunity to be heard. Fed. R. Civ. P. 53(b)(1). Any party may suggest
19 candidates for appointment. *Id.*

20 The Court sets a hearing on Defendants' motion for a special master because it cannot
21 grant a special master without giving the parties notice and an opportunity to be heard. At this
22 stage, the Court is not inclined to appoint a special master considering its decisions on the
23 motions to quash and for a protective order. However, in the event Defendants still wish to
24 pursue their motion, and Plaintiff wishes to oppose, the Court will hold a hearing. In the event
25 Defendants wish to withdraw their motion, they may move to do so, at which time the Court will
26 vacate the hearing.

Defendants have moved the Court to expedite its decision on the pending motions. (ECF No. 172). Plaintiff did not oppose that request. (ECF No. 175). The Court has prioritized this matter before other matters that were ripe before it. The Court thus grants Defendants' motion.

IT IS FURTHER ORDERED that Plaintiff's motion for a protective order (ECF No. 169) is **granted in part and denied in part** as outlined in this order.

IT IS FURTHER ORDERED that the Court sets a hearing on Defendant's motion for a special master on **Thursday, September 1, 2022 at 11:00 AM in Las Vegas Courtroom 3A.**


DANIEL J. ALBREGTS
UNITED STATES MAGISTRATE JUDGE